No. 146

In the Supreme Court of the United States

OCTOBER TERM, 1957

UNITED STATES OF AMERICA, PETITIONER

v.

HOWARD A. MCNINCH, D/B/A THE HOME COMFORT CO., ROSALIE MCNINCH AND GARIS P. ZEIGLER; FREDERICK L. TOEPLEMAN; AND CATO BROS., INC., WILFRED R. CATO, WILLIAM R. CATO, AND MAGIE L. DUNN (NEE: MAGIE L. STONE).

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES

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BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The consolidated opinion of the Court of Appeals in these cases (R. 12–20) is reported at 242 F. 2d 359. The opinion of the District Court for the Eastern District of South Carolina in *McNinch* (R. 6–10) is not reported. The opinion of the District Court for the Eastern District of North Carolina in *Toepleman* (R. 29–37) is reported at 141 F. Supp. 677. The opinion of the District Court for the Eastern District of Virginia in *Cato* (R. 71–74) is not reported.

JURISDICTION

The judgments of the Court of Appeals in all three cases were entered on February 28, 1957 (R. 20). A petition for a writ of certiorari was filed on May 28, 1957 and was granted on October 14, 1957 (355 U. S. 808). The jurisdiction of this Court rests upon 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether a claim against funds of the Commodity Credit Corporation—a wholly-owned Government corporation, operating within and as part of the Department of Agriculture, the funds of which are furnished and, if necessary, supplemented by Congress on an annual basis—is a "claim upon or against the Government of the United States, or any department or officer thereof", within the meaning of the civil False Claims Act.

2. Whether a claim against the Federal Housing Administration—an unincorporated, quasi-independent, agency operating within the Housing and Home Finance Agency with funds appropriated by Congress—is a "claim upon or against the Government of the United States, or any department or officer thereof", within the meaning of the civil False Claims Act.

3. Whether a fraudulent claim for a Government guaranty of an FHA home improvement loan constitutes a "claim against the United States", under the Civil False Claims Act, prior to default on the loan and indemnification of the lender by FHA.

STATUTE INVOLVED

The civil False Claims Act (12 Stat. 696, 698, R. S. 3490, 5438, 31 U. S. C. 231) provides in relevant part:

> Any person not in the military or naval forces of the United States, or in the militia called into or actually employed in the service of the United States, who shall make or cause to be made, or present or cause to be presented, for payment or approval, to or by any person or officer in the civil, military, or naval service of the United States, any claim upon or against the Government of the United States, or any department or officer thereof, knowing such claim to be false, fictitious, or fraudulent, or who, for the purpose of obtaining or aiding to obtain the payment or approval of such claim, makes, uses, or causes to be made or used, any false bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement or entry, or who enters into any agreement, combination, or conspiracy to defraud the Government of the United States, or any department or officer thereof, by obtaining or aiding to obtain the payment or allowance of any false or fraudulent claim, * * * shall forfeit and pay to the United States the sum of $2,000, and, in addition, double the amount of damages which the United States may have sustained by reason of the doing or committing such act, together with the costs of suit; and such forfeiture and damages shall be sued for in the same suit.

STATEMENT

These three actions were brought by the United States under the civil False Claims Act, *supra*, p. 3, seeking recovery against each of the respondents for fraudulent claims made or caused to be made by them, in the course of their obtaining Government loans or loan guaranties from either Commodity Credit Corporation or the Federal Housing Administration. The Court of Appeals for the Fourth Circuit, in a consolidated opinion, held the Act to be inapplicable (R. 13–20).

A. THE FACTS. The relevant facts in each case are undisputed and are as follows:

1. *Cato.* Respondents, a corporation and its three principal directors, officers and shareholders, were engaged in the business of cotton ginning and warehousing in Emporia, Virginia (R. 55–56). On August 3, 1948, the Commodity Credit Corporation entered into a Lending Agency Agreement with the corporation, pursuant to the Stabilization Act of 1942 (56 Stat. 767) and the Commodity Credit Corporation Charter Act (62 Stat. 1070), authorizing Cato Bros., Inc., as Commodity's agent, to make nonrecourse loans to producers of eligible 1948 crop cotton (R. 57). The Agreement and the applicable Department of Agriculture regulations (1948 Cotton Loan Instructions, 13 F. R. 4338) authorized the designated agent to receive from cotton producers executed Cotton Producers' Notes, together with warehouse receipts covering cotton pledged as security for the loans (R. 56–58). Each note was required to contain, *inter alia*, a certification by its maker that

he had produced the cotton on which the loan was to be made (R. 57). The Agreement provided that the agent would disburse the face amounts of the notes and thereafter transmit the notes to the Commodity Credit Corporation ("Commodity") (R. 58). Commodity, in turn, would repay the agent the amounts which it had previously disbursed plus interest at the rate of 1½ percent per annum from the date of the notes to the date of payment by Commodity (R. 58). The Agreement required the agent, in transmitting the notes, to certify that the representations by the maker were true to the best of the agent's knowledge and belief, and that the cotton listed on the note was "eligible" cotton as defined in the 1948 Cotton Loan Instructions (R. 58-59).[1]

Between September 1, 1948 and November 30, 1948, respondents induced a number of bona fide cotton producers to sign more than 280 cotton producer note forms in blank (R. 58). On these forms, respondents listed the warehouse receipt numbers of cotton which they had purchased from various sources, but which had not been produced by the makers of the notes (R. 58). The forms were completed by respondents with the following statements falsely certified therein: that the note makers had produced the cotton; that the benefits of the loan evidenced by the

[1] The 1948 Cotton Loan Instructions provided that loans on eligible cotton would be made to eligible producers. An "eligible producer" was defined as any person producing cotton during the year 1948 in the capacity of landowner, landlord, tenant, or sharecropper. "Eligible cotton" was defined as cotton which, *inter alia*, had been produced by the person tendering it for a loan (R. 57).

notes would accrue solely to the note makers and any tenants and sharecroppers having an interest in the cotton; and that the benefits of the loan had not been transferred to any other party (R. 59). In addition, respondent Magie L. Stone, acting with the knowledge and consent of the other respondents, made the required certification with respect to each note that the above statements (purportedly made by the producers) were correct to the best of her knowledge and belief, and that the cotton was "eligible" (R. 59–60). Respondents received payment on the fraudulent notes together with 1½ percent interest—the fee provided as compensation for the use of the money purportedly disbursed by them to the producers (R. 60). However, respondents made no disbursements to the producers—the latter having no interest in the pledged cotton—but rather retained for themselves the Commodity payments (R. 61).

Suit was thereafter brought by the Government under the civil False Claims Act seeking recovery of double damages and forfeitures (R. 55–61). The District Court for the Eastern District of Virginia, following a trial on the merits, gave judgment for the United States (R. 74–75). The court—having previously ruled that a claim against Commodity Credit Corporation is a claim against the United States within the meaning of the civil False Claims Act (R. 69–70)—held that respondents "made and caused to be presented for payment * * * thirty (30) claims upon the United States, knowing the said claims to be

false" (R. 74).[2] A judgment under the Act in the Government's favor was entered in the amount of $60,000, representing a $2,000 forfeiture for each of the thirty transmittal letters (R. 74).[3]

2. *Toepleman.* Respondent Toepleman and Garland Greenway were in partnership as cotton factors and warehousemen with offices in Henderson and Louisburg, North Carolina, during the cotton marketing year from July 1, 1948–June 30, 1949 (R. 31). The Government's 1948 cotton price support program was in force at this time (R. 31) and respondent, desiring to take advantage of this program, set into operation a scheme whereby, though ineligible, he could obtain the low interest non-recourse loans offered by Commodity (R. 32–33). Toward that end, respondent obtained the signatures in blank of 14 bona fide cotton producers on 82 Cotton Producer's Notes—the official forms employed in obtaining cotton loans from Commodity (R. 32).[4] He then purchased 325 bales of 1948 crop cotton from various sources and listed the warehouse receipt numbers and descrip-

[2] Although nearly 300 fraudulent notes had been sent to Commodity, they were forwarded for payment in thirty letters of transmittal. The District Court regarded each letter of transmittal, rather than each note, as a claim under the Act (R. 74).

[3] The Government had additionally sought, in damages, double the amount of the net loss ($31,598.59) which it had incurred in selling the pledged cotton (R. 67). This claim was denied by the District Court on the ground that Commodity held the cotton represented by the notes for an unreasonably long period of time before disposal, and that during the interval the cotton could have been sold at a profit (R. 73).

[4] The District Court found that at all times respondent purported to act through the partnership but acted without Greenway's knowledge (R. 33).

tion of this cotton on the producers notes, representing that the cotton thus listed had been produced by the notes' makers (R. 32). Thereafter, respondent tendered 57 of these notes to the First National Bank of Henderson, North Carolina, and the remaining 25 notes to the First Citizens Bank and Trust Co. of Louisburg, North Carolina—both being Commodity-approved lending agencies—requesting a Government loan on each note (R. 32). The lending agencies, on the basis of the representations made, disbursed the proceeds of the loans to respondent, apparently regarding him or the partnership as agent for the producers whose names appeared on the notes (R. 32). The banks, in turn, transmitted the notes to Commodity and received reimbursement of the proceeds plus 1½ percent interest, all as provided by statute and the 1948 cotton regulations (R. 33). Subsequently, respondent repaid 39 of the notes and redeemed the cotton thereunder (R. 33). Forty-three of the notes went unpaid at maturity and the cotton securing the loans was sold in January 1955 at a loss to the Government of $6,733.97 (R. 33).

Following a hearing at which the foregoing facts were established, the District Court for the Eastern District of North Carolina entered judgment for the Government (R. 37–38). Rejecting respondent's contentions to the contrary, the court held, *inter alia,* that a false claim filed against Commodity Credit Corporation is a "claim upon or against the Government of the United States or any department or officer thereof" within the meaning of the civil False Claims Act (R. 31); that presentation of these claims to the lend-

ing agency caused them to be presented for payment by the Government (R. 35); and that recovery by the Government for each false claim is not dependent upon a showing of loss (R. 36). It went on to find that each of the 82 notes in question pledged ineligible cotton and that such fact was known to respondent at the time (R. 33, 34). The court awarded $164,000 in damages to the United States, holding that each of the 82 notes constituted a separate claim against the Government to which the $2,000 liquidated damages provision of the Act applied. (R. 36, 38).[5]

3. *McNinch.* The Government's complaint, filed in the District Court for the Eastern District of South Carolina, alleged the following: Respondents Howard A. McNinch, Rosalie McNinch, and Garis P. Zeigler were president, secretary, and a salesman, respectively, of an unincorporated home construction business, the Home Comfort Company, located in Columbia, South Carolina (R. 2). At various times from November 6, 1951 to January 10, 1953, respondents presented to the South Carolina National Bank, a Federal Housing Administration-approved lending institution, eleven fraudulent F. H. A. loan credit applications for the purpose of obtaining or aiding to obtain FHA-insured home improvement loans under Title I of the National Housing Act, as amended. (R.

[5] However, the court refused to allow the Government double its ascertainable damages as provided in the Act, holding that the injury to the United States was not "sustained by reason of the doing or committing such act [the false claim]" as required by the statute (31 U. S. 231), but resulted from a drop in the market price of the cotton (R. 36–37).

2–3, 14).[6] The loans were sought on behalf of homeowner customers with whom respondents had contracted to carry out home improvements and were for the purpose of financing such improvements (R. 2–3). The applications, which were entitled "FHA Title I Credit Application (Property Improvement Loan)", were accompanied in each case by a fictitious credit report of the Associated Credit Bureaus (R. 3). Both the applications and the reports misrepresented the financial eligibility of the customers for the loans and were known by the respondents to be fraudulent (R. 3). The applications were submitted, further-

[6] Under Title I of the National Housing Act (12 U. S. C. 1701, *et seq.*), the Federal Housing Commissioner is empowered, upon such terms and conditions as he might prescribe, to insure qualified lending institutions against losses sustained as a result of loans made by them for the purpose of financing alterations, repairs, and improvements upon or in connection with real property. FHA enters into an insurance contract undertaking to indemnify the lenders against loss sustained by them on loans reported for insurance to FHA up to an aggregate amount equal to ten percent of the value of such loans. A borrower, who wishes to obtain an improvement loan, applies to the lending institution on an FHA form ("FHA Title I Credit Application (Property Improvement Loan)"). Responsibility for determining that the borrower is a reasonable credit risk rests with the lending institution, which is permitted to rely on statements of fact made by the borrower (*infra*, p. 65). Within 31 days after the loan is made, the lender must report the details of the loan transaction to FHA on an FHA form provided for the purpose, and must furnish FHA with a statement that the above requirements have been complied with. After the loan is made and the details of the transaction have been reported to FHA, that agency computes the insurance premium which will be due and payable by the lending institution, records the transaction on its official records, and acknowledges the loan for insurance. See 24 CFR 201.0–201.13. See also Appendix, *infra*, pp. 61–67.

more, with the intent that they should be reported to, and accepted by, the Federal Housing Administration for insurance (R. 3). The South Carolina National Bank, relying on the false applications and credit reports, approved the requested loans and applied to the FHA for insurance pursuant to Title I (R. 3). In accordance with its contractual commitment, the FHA, in turn, acknowledged the loans for insurance (R. 3). The proceeds of the loans were deposited to the account of the Home Comfort Co. in the South Carolina National Bank (R. 3).

The complaint alleged that respondents, through the fraudulent credit applications and credit reports submitted by them to the bank, "made or caused to be made, presented or caused to be presented * * * upon the United States for payment or approval", eleven false claims in violation of 31 U. S. C. 231 and also that, between the aforementioned dates, respondents "agreed, combined, and conspired with each other * * * to defraud the United States * * * by obtaining or aiding to obtain the payment or approval of false, fictitious or fraudulent claims for loans or advances of credit insured by the Federal Housing Administration" (R. 3, 4, 14). The Government sought $2,000 in liquidated damages for each of the eleven fraudulent loan applications pursuant to the provisions of the civil False Claims Act (R. 4).[1]

[1] In respondents' Court of Appeals brief (pp. 2–3), it was stated that, before the present action was brought, respondent Howard A. McNinch repurchased all of the outstanding FHA-insured loans and mortgages and assigned them to the bank for collection; and further that McNinch and Garis P. Zeigler were convicted of making false statements for the purpose of obtain-

Respondents moved to dismiss the Government's action on the ground that the complaint failed to state a claim upon which relief could be granted (R. 5–6). The District Court granted this motion (R. 6–10). The court held that the bank was not the Government or a department thereof, and that the fraudulent loan applications and credit reports presented to it did not constitute claims "upon or against the Government of the United States, or any department or officer thereof" within the meaning of the Act (R. 9). The court further expressed its agreement with the view that the statutory term "claim" signifies a demand for money or property as of right and that, as the loans had not been defaulted, no such demand had been made upon the Government and the Act had not been violated (R. 9–10).

B. THE DECISION BELOW. The Court of Appeals for the Fourth Circuit disposed of the three cases in a single opinion (R. 12–20). It reversed the judgments in *Cato* and *Toepleman*—the cases involving Commodity Credit Corporation—holding that the civil False Claims Act was inapplicable since a "government corporation, even though acting as an agency of the government is not the government, nor is it a department or officer of the government" (R. 17). The *McNinch* dismissal was affirmed by the Court of Appeals on the same ground, notwithstanding the fact that the false claims there involved were against the Federal Housing Administration, an unincorporated agency of the Government (R. 19–20); *infra*, pp.

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ing FHA-insured loans in violation of 18 U. S. C. 1010. See also, R. 14.

40–44). As an alternative ground for holding the Act inapplicable in *McNinch*, the Fourth Circuit stated that "the obtaining of the guaranty of loan was not the making of a claim with the meaning of the statute. *United States* v. *Tieger*, 3 Cir. 234 F. 2d 589, certiorari denied, 352 U. S. 941; *United States* v. *Cochran*, 5 Cir. 235 F. 2d 131, certiorari denied, 352 U. S. 941." (R. 20.)

SUMMARY OF ARGUMENT

I

Both Commodity Credit Corporation and the Federal Housing Administration are embraced within the phrase the "Government of the United States" as used in the civil False Claims Act (R. S. 3490 as it incorporates R. S. 5438; 31 U. S. C. 231). The contrary holding of the court below reflects the mechanical approach to the scope of the Act which this Court rejected in *United States ex rel. Marcus* v. *Hess*, 317 U. S. 537, and stems from a conception of the nature of a Government corporation which no longer retains vitality. The decision below is in conflict with *United States* v. *Rainwater, et al.*, 244 F. 2d 27, No. 276, this Term, certiorari granted, 355 U. S. 811, October 14, 1957. In *Rainwater*, the Court of Appeals for the Eighth Circuit accords recognition to the realities which have led this Court in recent decades to view the modern wholly-owned Government corporation as indistinguishable from the Government itself in circumstances comparable to those presented here. Giving full play to the functional interpretation properly accorded the civil False Claims Act in *Hess*, the

Eighth Circuit holds that Commodity—the Government corporation there involved—is nothing more than a "bookkeeping device" in its handling of Federal monies and that a fraudulent claim to those monies is a claim against the "Government of the United States" within the meaning of the Act. We submit that the Eighth Circuit is correct.

A. (1). The civil False Claims Act was designed to afford protection against those who would "cheat the United States." Its terms are broad enough to embrace those agencies of the Government, whenever and in whatever form created, whose activities render property of the United States vulnerable to fraudulent claims; those terms are not limited to the agencies or types of agencies in existence at the time of the Act's original passage. Recent decisions of this Court refute the view that a Government agency, because of its corporate form, must be accorded, for all purposes, a status apart from that of the Government itself. To the contrary, they teach that the identity of such corporations with the Government will be recognized "when realities become decisive". *Inland Waterways Corp.* v. *Young*, 309 U. S. 517, 524; see also, *Cherry Cotton Mills* v. *United States*, 327 U. S. 536. The nature of the corporate agency and activity involved must therefore be appraised; and the corporate shell is particularly transparent where, as here, public funds are involved.

(2). Properly framed, the issue is whether, when Congress created Commodity, it was done in such a manner as to make that agency a part of the "Government of the United States" for purposes of the

civil False Claims Act. Every relevant aspect of Commodity's structure, especially its financial status, bespeaks identity. The agency's funds are supplied by the Government, its losses borne by the Government, and its obligations are unconditionally guaranteed by the United States. For False Claims Act purposes, and under the pragmatic view adopted in *Hess, supra,* this fiscal identity is critical since a claim against Commodity's funds is a claim against the monies of the United States—the type of claim the Act was unquestionably intended to reach. Commodity—and through it, the United States—is particularly vulnerable to false claims because of the nature of the federal programs which it executes. The remedial provisions of the civil Act are essential if the vast amounts of public funds committed to these programs are to receive the safeguards to which they are entitled.

(3). The force of the foregoing considerations is not diminished by virtue of the fact that the criminal False Claims Act was amended in 1918 to cover claims against corporations "* * * in which the United States of America is a stockholder", with no comparable amendment being made in the language of the civil Act. The 1918 amendment to the criminal Act was designed to cover the Emergency Fleet Corporation, a locally incorporated entity whose charter contemplated stock ownership by private parties as well as the Government. *United States* v. *Bowman,* 260 U. S. 101–102; *Sloan Shipyards Corp.* v. *U. S. Fleet Corporation,* 258 U. S. 549, 565. The applicability of a criminal statute to such a corporation, on the

basis of its being the "Government of the United States," was understandably subject to doubt. However, the modern wholly-owned Government corporation, such as Commodity, bears little resemblance to the pioneer Fleet Corporation. Commodity's status as a part of the "Government of the United States" for purposes of the civil Act must be determined in the light of Commodity's own characteristics—markedly different than those of its World War I forerunners. Congress, in other words, *could* create a Government corporation so as to bring it within the broad statutory coverage of the civil Act and, we submit, in the case of Commodity this is precisely what Congress has done.

Similarly immaterial is the fact that Commodity's Charter Act provides criminal penalties for false statements to the corporation without expressly providing for civil liability. 15 U. S. C. 714m (a). The civil False Claims Act is one of general applicability and, unless special statutory provision is made excluding coverage, its provisions are fully applicable to an agency of Government otherwise within its scope. Significantly, the Charter Act provides only that the general *penal* statutes will be inapplicable to offenses specifically covered therein. 15 U. S. C. 714m (e).

B. The status of the Federal Housing Administration as a part of the "Government of the United States" is even clearer than that of Commodity. Not even a corporate shell distinguishes FHA from the "Government of the United States", and the agency's substantive identity with the Government has already been acknowledged by this Court. *United States* v.

Emory, 314 U. S. 423; *United States* v. *Summerlin*, 310 U. S. 414. The power conferred upon the head of that agency "to sue and be sued" was not a grant of corporate status. Congress merely withheld the immunity from suit which it could have conferred and also, for purposes of convenience, allowed the Commissioner to press agency claims in his own name. See *Korman* v. *Federal Housing Administration*, 113 F. 2d 743 (C. A. D. C.); cf. *Federal Housing Administration* v. *Burr*, 309 U. S. 242. The agency's subjection to the auditing and budgetary provisions of the Government Corporation Control Act (31 U. S. C. 841, *et seq.*) was designed solely to afford greater control over its operations and, rather than indicating insulation from the Government, is a further sign of identity.

II

A. A claim of right to FHA loan insurance is a "claim" against the United States under the False Claims Act irrespective of default on the loan insured and indemnity payment by the Government. The lower court's contrary holding in *McNinch*—stated as an alternative reason for the Act's inapplicability to the FHA claims—is based on similar prior decisions by the Third and Fifth Circuits. *United States* v. *Tieger*, 234 F. 2d 589 (C. A. 3), certiorari denied, 352 U. S. 941; *United States* v. *Cochran*, 235 F. 2d 131 (C. A. 5), certiorari denied, 352 U. S. 941. Both *Tieger* and *Cochran* declare the Act applicable solely to demands for Government "money or property" and hold that a claim of right to Government credit insurance does not so qualify—at least in the absence of a subsequent default. These decisions insert a

questionable qualification upon the plain terms of the Act which speak of "any claim". But even if the statute be construed to cover only claims for "money or property", the present claims to Government credit insurance are within the statutory purview since they constitute claims to Government "property". In our highly developed commercial economy, the credit of the Government, no less than that of private parties, represents a valuable property interest, and only under the narrowest of conceptual views can that credit be relegated to a status less than that of the Government's tangible assets. The insurance which the Federal Housing Administration is authorized to provide—and which commits the Government's credit—is manifestly of substantial value, both to the borrower who seeks his loan on the basis of eligibility for such insurance and to the lending institution whose loan is ultimately insured. In its private forms, such insurance is a well-recognized item of commerce and constitutes a valuable and enforceable property right. If anything, a Government loan guaranty has added value since the risk undertaken by the United States is premised upon an unwillingness of private interests to hazard their resources on comparable terms. These circumstances provide ample incentive for those who, like respondents in *McNinch,* desire to obtain the benefits of the Government's credit at a risk the Government would not knowingly undertake. Every consideration indicating statutory coverage where the tangible properties of the Government are involved applies here with equal force.

B. A default upon a loan which the Government is fraudulently induced to insure is not a condition precedent to invocation of the remedial provisions of the False Claims Act. The sole effect of a default is that it gives rise to a specific ascertainable loss, the absence of which clearly does not preclude civil recourse against the defrauder. *United States ex rel. Marcus* v. *Hess*, 317 U. S. 537; *Rex Trailer Co., Inc.* v. *United States*, 350 U. S. 148. Moreover, to delay the defrauder's amenability to the False Claims Act until there has been a default severely limits the efficacy of the Government's remedy—a remedy which seeks compensation for injuries in no way dependent upon a default and a consequent out-of-pocket loss. Cf. *Rex Trailer, supra*, 350 U. S. at 153–154. The interim between claim and default may well see such a depletion in the defrauder's resources as to make the civil remedy meaningless. Indeed, where the borrower is the defrauder, the default itself signals financial irresponsibility. Add to this the evidentiary problems which such a delay may entail, and the desirability of immediate recourse against the defrauder is manifest. The statute permits such immediate recourse.

ARGUMENT

I

Fraudulent Claims Presented or Caused To Be Presented to Commodity Credit Corporation or the Federal Housing Administration Constitute Claims Against the "Government of the United States" Under the civil False Claims Act

The primary basis for the decision below is the narrow reading given the term "Government of the

United States" as it is used in the civil False Claims Act (R. S. 3490 as it incorporates R. S. 5438; 31 U. S. C. 231). The court holds, in substance—treating both the incorporated Commodity and the unincorporated Federal Housing Administration, alike, as "government corporations" (R. 19)—that a wholly-owned Government corporation, operating exclusively as an instrumentality of the United States, and executing federal programs with public monies, is not the "Government of the United States" within the meaning of a statute designed to "provide protection against those who would 'cheat the United States.'" (*United States ex rel. Marcus* v. *Hess*, 317 U. S. 537, 544).

Underlying the Fourth Circuit's decision is a stress upon form to the almost complete exclusion of substance and a conception of the wholly-owned Government corporation outmoded both by Congressional action and the decisions of this Court. These factors have been given proper perspective by the decision of the Court of Appeals for the Eighth Circuit in *United States* v. *Rainwater, et al.* (244 F. 2d 27, certiorari granted, 355 U. S. 811), No. 276, this Term, now pending before this Court. There, as in the *Cato* and *Toepleman* parts of the present case, the Government had brought suit under the civil False Claims Act seeking recovery for fraudulent claims caused to be presented to Commodity by persons ineligible to receive non-recourse cotton loans but who nevertheless applied for and received loans on cotton produced by others. Categorically rejecting the earlier Fourth Circuit decision, the Eighth Circuit ruled that the Act applied to

false claims against Commodity. Central in *Rainwater* was the court's determination "that the ultimate source of payment of the fraudulent claims was the federal treasury and when so viewed there can be no distinction between a government corporation or the government itself being defrauded" (244 F. 2d at 29–30). Commodity's fiscal structure revealed it to be nothing more than a "bookkeeping device" for the handling of Government money—a matter of form which could not be allowed to obscure substantive realities in view of the functional interpretation of the Act dictated by *Marcus* v. *Hess* (*ibid.*, at 30–31). The Eighth Circuit stressed, also, decisions of this Court in recent years which had recognized the identity of the Government with its wholly-owned corporations in comparable circumstances (*ibid.*, at 31–32). The court concluded, we believe correctly, that no forced construction of the civil False Claims Act was needed to hold that false claims filed against Commodity fell within "the embrace of the statute" (*ibid.*, at 32).

A. COMMODITY CREDIT CORPORATION IS A PART OF THE "GOVERNMENT OF THE UNITED STATES" WITHIN THE MEANING OF THE CIVIL FALSE CLAIMS ACT

1. *The statutory term "Government of the United States"*

(a). The statutory language with which we are here concerned stems from the Act of March 2, 1863 (12 Stat. 696). Congress there provided both criminal penalties and civil recovery for the commission of specified acts, among which was the making of false, fictitious or fraudulent claims "against the Govern-

ment of the United States, or any department or officer thereof". The civil liability portion of the Act was subsequently codified in 1878 as Section 3490 of the Revised Statutes and the criminal provisions were separately enacted as R. S. 5438. Section 3490 provided for forfeitures and double damages if certain acts prohibited by R. S. 5438 should be committed; and Section 5438, in turn, encompassed generally the presentation for payment or approval of false claims "against the Government of the United States or any department or officer thereof".[8]

This general language has no further definition in the statute. Congress apparently assumed the sufficiency and flexibility of these words to cover operations to the Government which would render it vulnerable to those who would "cheat" it. The terms themselves are plainly comprehensive in scope, containing no limitation as to specific agencies or types of agencies that comprise "the Government of the United States". Moreover, as we read them, there is no implication in the words—nor does any appear in the legislative history—of a Congressional intent to limit the statutory protection to certain modes of Government operations or to then-existing opportunities for defrauding the United States. The broader reading is fully

[8] The civil provisions which have application to the present proceedings have not been amended since their enactment as part of the Revised Statutes in 1878, and are set forth, as they now stand, at 31 U. S. C. 231 (*supra*, p. 3). In 1909, R. S. 5438 was repealed (35 Stat. 1153) and superseded by Section 35 of the Criminal Code, 35 Stat. 1095. These criminal provisions were subsequently amended on several occasions and are now contained, in their amended form, in 18 U. S. C. 287 and 1001.

consonant with the fundamental intention of Congress which, as stated by the original Act's sponsor, was to provide protection against those who would "cheat the United States". Cong. Globe, 37th Cong., 3rd Sess., 952; see *United States ex rel. Marcus* v. *Hess,* 317 U. S. 537, 544. It is in harmony, moreover, with this Court's enjoinder that the safeguard which Congress provided is not subject to diminution by virtue of the "bookkeeping devices" that may be employed by the Government in carrying out its operations. *Marcus* v. *Hess, supra,* at pp. 544–545. In short, nothing in the Acts of 1863 and 1878, or in the history of their enactment, would indicate that the term "Government of the United States" was other than what it purports to be on its face—an open-ended, all-embracing term, sufficient to include the agencies through which the United States would carry on its activities and which, in turn, would provide targets for fraudulent claims against the public purse.

Concededly, the use of wholly-owned Government corporations to execute public programs and expend public monies is, for all practical purposes, a contemporary innovation. It is unlikely, therefore, that this method of carrying on the Government's business was of specific concern to the Congress either in 1863 or in 1878.[9] We submit, however, that it is

[9] Government-owned corporations were, of course, not unknown even in 1863. The Smithsonian Institution was incorporated in 1846 (9 Stat. 102). Congress, moreover, had chartered corporations such as banks and railroads "as appropriate means of executing the powers of government". *Luxton* v. *North River Bridge Co.,* 153 U. S. 525, 529; cf. *McCulloch* v. *Mary-*

immaterial whether or not Congress specifically contemplated a wholly-owned Government corporation when it employed the general term "Government of the United States". The issue, properly put, is whether when Congress created the Commodity Credit Corporation it did so in such a manner as to make Commodity part of the "Government of the United States". We show below in detail (*infra*, pp. 28–32) that Congress so acted.

By adopting as its basic premise the proposition that a government corporation "is not the government" (R. 17), the court below failed to recognize the status of modern corporate entities, as instruments of Government, resulting from post-World War I substantive legislative and judicial development. Rather, the Fourth Circuit places principal reliance on cases dealing with the Emergency Fleet Corporation (R. 17–18) which express some earlier concepts of the nature of a Government corporation that have lost their vitality.

The Fleet Corporation was a pioneer effort in employing a corporate device to carry out a Governmental program in which commercial considerations were of prime importance. The corporation was formed in 1917 by the Shipping Board pursuant to the specific authority to create corporations conferred by Section 11 of the original Shipping Board Act of September 7, 1916 (39 Stat. 728, 731). It was char-

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land, 4 Wheat. 316. But the latter bear no relation to the wholly-owned Government corporation; rather, they were private corporations in which the Government had an interest. Cf. *Emergency Fleet Corp.* v. *Western Union Telegraph Co.*, 275 U. S. 415, 426.

tered under the general laws of the District of Columbia as a private corporation with the power, *inter alia*, to purchase, construct and operate merchant vessels. Pursuant to Section 11 of the Act, *supra*, the Board, on behalf of the United States, was to purchase not less than a majority of the stock and, with the President's approval, it could sell all of such stock or any part thereof—with the restriction that no partial sale could be made which left the United States as a minority stockholder.[10] Understandably, this novel hybrid-entity, chartered like any private business under local law and in which private persons as well as the Government might become stockholders, occupied an uncertain position insofar as its status as part of the Government was concerned. Cf. *Sloan Shipyards* v. *U. S. Fleet Corporation*, 258 U. S. 549; *Skinner & Eddy Corporation* v. *McCarl*, 275 U. S. 1; *United States* v. *Strang*, 254 U. S. 491; *United States* v. *Walter*, 263 U. S. 15.

However, the magnitude of governmental operations undertaken in corporate form, as well as the evolving nature of the wholly-owned Government corporation, has led this Court in recent decades to adopt a somewhat different approach to the status of these agencies. Any residuum of "proprietary" thinking has been discarded (cf. *Graves* v. *New York ex rel. O'Keefe*, 306 U. S. 466, 477; *Fed. Land Bank* v. *Bismarck Co.*, 314 U. S. 95, 102) and corporation identity with the Government has been accepted where

[10] The Government, subsequent to the corporation's formation, purchased and retained all of the capital stock. See *Sloan Shipyards* v. *U. S. Fleet Corporation*, *supra*, at 565.

realities so dictate—particularly where public properties are involved. The Court has held, for example, that the Reconstruction Finance Corporation, a Government corporation comparable to Commodity, is the "Government of the United States" for purposes of a statute allowing counterclaims in the Court of Claims (*Cherry Cotton Mills* v. *United States*, 327 U. S. 536); that a national bank may pledge its assets to secure deposits of Government corporations, despite the fact that the National Banking Act permits pledges only to secure deposits of "Treasury" funds (*Inland Waterways Corp.* v. *Young*, 309 U. S. 517); that the Federal Crop Insurance Corporation is the Government for purposes of precluding contractual liability on the basis of an estoppel (*Federal Crop Ins. Corp.* v. *Merrill*, 332 U. S. 380); and that the assets of a Government corporation are immune from state taxation since they are the property of the United States (*Clallam County* v. *United States*, 263 U. S. 341). See also *Emergency Fleet Corp.* v. *Western Union Telegraph Co.*, 275 U. S. 415; *U. S. Grain Corporation* v. *Phillips*, 261 U. S. 106; cf. *Federal Land Bank* v. *Bismarck Co.*, 314 U. S. 95, 102.

Moreover, because of the nature of the relationship between a Government-owned corporation and the United States, it has been uniformly recognized that the United States may sue in its own name upon claims which arise out of the transactions of such corporations—the Government being the real party in interest. Cf. *Cherry Cotton Mills* v. *United States*, 327 U. S. 536; *New Brunswick* v. *United States*, 276 U. S. 547; *Clallam County* v. *United*

States, 263 U. S. 341; *Erickson* v. *United States*, 264 U. S. 246. Congress has, in fact, made specific provision for this in the Commodity Credit Corporation Charter Act, 15 U. S. C. 714b (c); cf. *United States* v. *Lindsay*, 346 U. S. 568. Thus, the fact that Congress has invested its corporate agencies with power to "sue and be sued" in their own names—a factor stressed by the court below (R. 17–18)—does not make them any less a part of the Government for purposes of enforcing the rights of the United States. This merely constitutes a waiver of the sovereign immunity which Congress could have bestowed upon its agencies (*Keifer & Keifer* v. *R. F. C.*, 306 U. S. 381, 389) and also subjects these instrumentalities to certain incidents of litigation such as liability for costs (*Reconstruction Finance Corporation* v. *Menihan Corp.*, 312 U. S. 81) and, where not precluded (see 15 U. S. C. 714b (c)), garnishment proceedings (*Federal Housing Administration* v. *Burr*, 309 U. S. 242). But the agency, despite these characteristics and its corporate name, is not converted into "something other than what it actually is, an agency selected by Government to accomplish purely governmental purposes" (*Cherry Cotton Mills* v. *United States*, 327 U. S. 536, 539) and whose funds "are, for all practical purposes, Government funds" (*Inland Waterways Corp.* v. *Young*, 309 U. S. 517, 524).

In short, the "true nature of these modern devices [Government corporations] for carrying out governmental functions is recognized * * * when realities become decisive". *Inland Waterways Corp.* v. *Young*,

309 U. S. 517, 524." With that perspective, a survey of the organizational and fiscal structure of Commodity demonstrates that it is as much a part of the "Government of the United States" as any regular department or non-corporate agency, and that its funds—which are the Government's funds—are entitled to the protection of the civil False Claims Act.

2. *The Structure of Commodity Credit Corporation*

Whether the decisive realities to which this Court has referred, *supra,* be structural, functional, or fiscal, no practical distinction can be drawn for the purposes

[11] These realities should be recognized in weighing the force of the decision in *United States ex rel. Salzman* v. *Salant & Salant, Inc.*, 41 F. Supp. 196 (S. D. N. Y.), relied on by the court below for the proposition that a Government corporation is not the Government within the meaning of the False Claims Act. The false claims there involved were made against the American Red Cross which the court held not to be a part of the Government even though it was incorporated under an act of Congress and received a donation from the United States to be used for a specified purpose. The court stated that "In no sense are its funds the property of the Government", 41 F. Supp. at p. 197. The distinction between the Red Cross and a wholly-owned Government corporation such as Commodity is readily apparent. The former is a quasi-public, principally volunteer organization, operating primarily on public contributions, whereas the latter is a Government instrumentality, staffed by federal employees and operating on Government funds. In any event, it is noteworthy that *Salzman* was relied upon by the Third Circuit in *Hess* (127 F. 2d 233, 237) which decision was subsequently overturned by this Court (317 U. S. 537). Moreover, in a later decision of the District Court for the Southern District of New York, it was expressly held that a wholly-owned Government corporation, Federal Surplus Commodities Corporation, was the Government for purposes of the False Claims Act, *United States* v. *Samuel Dunkel & Co.*, 61 F. Supp. 697, 699 (S. D. N. Y.).

of the civil False Claims Act between Commodity Credit Corporation and the Government itself.

The Commodity Credit Corporation Charter Act (62 Stat. 1070, 15 U. S. C. 714, *et seq.*) establishes Commodity as "an agency and instrumentality of the United States, within the Department of Agriculture", created for the purpose of stabilizing farm income and prices, assisting in the maintenance of balanced and adequate supplies of agricultural commodities and of facilitating their orderly distribution.[12] Management of Commodity is vested by the Act in a board of directors, subject to the general supervision of the Secretary of Agriculture who, as an *ex officio* director, serves also as chairman of the board. 15. U. S. C. 714g (a). Six other directors are appointed by the President with the advice and consent of the Senate and perform such other duties as are prescribed by the Secretary. 15 U. S. C. 714g (a). The directors and officers are all officials of the Department of Agriculture, being compensated as such rather than as officers of Commodity. Similarly, all

[12] Commodity was originally incorporated under Delaware law. In 1939, the corporation, its functions and activities, together with its personnel, records and property were transferred to the Department of Agriculture (1939 Reorg. Plan No. 1, § 401, 4 F. R. 2730, 53 Stat. 1429). Administration of the corporation's programs was subsequently consolidated in the Production and Marketing Administration of that Department (1946 Reorg. Plan No. 3, § 501, 11 F. R. 7877, 60 Stat. 1100). In 1948, the corporation was reincorporated under a Congressional charter, in compliance with the provisions of the Government Corporation Control Act (59 Stat. 597, 602), which required federal incorporation if Commodity was to remain a Government instrumentality. See Senate Report No. 1022, 80th Cong., 2d Sess., p. 5.

of Commodity's other employees are employed by the Department of Agriculture, many spending part of their time on corporation affairs and part on other departmental matters, as was specifically contemplated by the Act creating Commodity. See 15 U. S. C. 714g (a), 714i; see also Senate Report 1022, Committee on Agriculture and Forestry, 80th Cong., 2d Sess. The corporation, apart from its intra-departmental status, is subject to the auditing, budgetary and other provisions of the Government Corporation Control Act. 31 U. S. C. 846, *et seq.*; see, *infra*, pp. 37–38.

Other elements in the agency's statutory makeup merit attention. Commodity is to have "all the rights, privileges, and immunities of the United States" with respect to priority of payment of debts due from insolvent, deceased, or bankrupt debtors. 15 U. S. C. 714b (e). The notes and other obligations issued by it are to be deemed instrumentalities of the United States and, as such, they and their income are exempted from almost all federal and local taxation. 15 U. S. C. 713a–5. Furthermore, the corporation's property is exempt from federal taxation and, with the exception of real estate, from all local taxation. 15 U. S. C. 713a–5.

Of even greater significance, we believe, in fixing Commodity's status for False Claims Act purposes, is the source of the agency's funds. Commodity's entire original capital, $100,000,000, was supplied by the United States. 15 U. S. C. 714c. By statutory directive, the Secretary of the Treasury must make an annual appraisal of Commodity's net worth and, if the net worth is less than $100,000,000, the Treasury must

restore the amount of the capital impairment. 15 U. S. C. 713a–1. If the appraisal reveals any excess over $100,000,000, the Treasury is to be its recipient. 15 U. S. C. 713a–2.[13] In addition, Commodity is authorized to borrow up to fourteen and one-half billions of dollars on the credit of the United States to carry out its statutory programs. 15 U. S. C. (Supp. IV) 714b (i). In sum, the funds of this corporation "are, for all practical purposes, Government funds; the losses, if losses there be, are the Government's losses". *Inland Waterways Corp.* v. *Young,* 309 U. S. 517, 524.

We agree with the Court of Appeals for the Eighth Circuit which, in *Rainwater,* found no material distinction between Commodity and the Reconstruction Finance Corporation the wholly-owned Government corporation before the Court in *Cherry Cotton Mills* v. *United States,* 327 U. S. 536. Here, as in *Cherry Cotton Mills* (327 U. S. at 539):

> * * * [The corporation's] Directors are appointed by the President and confirmed by the Senate; its activities are all aimed at accomplishing a public purpose; all of its money comes from the Government; its profits, if any, go to the Government; its losses the Government must bear. That the Congress chose to call it a corporation does not alter its characteristics so as to make it something other than

[13] Because of the nature of the programs which it executes, Commodity is plainly not a profit-making venture. Thus, recent acts of Congress have directed restoration of Commodity's capital impairment in the following amounts: 70 Stat. 238 ($929,287,178); 69 Stat. 60 ($1,634,659); 67 Stat. 222 ($96,205,161); 66 Stat. 354 ($109,391,154); 65 Stat. 244 ($427,000,000).

> what it actually is, an agency selected by Government to accomplish purely governmental purposes. * * *

If Commodity's characteristics are such as to qualify it as the "Government of the United States" in other areas on the basis of an inseparability of interests, there is no valid ground for denying it that status under the civil False Claims Act. To the contrary, if the Act's purpose is to provide protection against those who would "cheat the United States", the relevant considerations—particularly those relating to Commodity's fiscal structure—militate in favor of a determination of identity.

3. *This Court's Decision in Marcus* v. *Hess*

The functional interpretation of the False Claims Act's language—the "Government of the United States"—which the Government seeks in this case is fully supported by this Court's decision in *Marcus* v. *Hess*, 317 U. S. 537. In that case, an informer's *qui tam* action under the civil False Claims Act, federal monies had been granted by the Public Works Administrator to local municipalities and school districts in Pennsylvania, to be expended on public works projects. The defendants, officers and members of the Electrical Contractors Association of Pittsburgh, conspired to rig the bidding on these projects. As a consequence, false claims were asserted against and payment made by the state agencies—under *their* contracts with defendants—from joint bank accounts containing both state and federal funds. The Federal Government was, accordingly, required to contribute more for the

electrical work on the projects than it would have been required to pay had there been *bona fide* competition in the contracting between defendants and the municipalities. The Court of Appeals for the Third Circuit, reversing a District Court judgment against the contractors, held that the False Claims Act must be construed with "utmost strictness", that it did not apply to a false claim presented by or to a third party or where the defendant had no direct contractual relationship with the United States, and that claims on fraudulent contracts with non-federal agencies were not claims against the United States under the Act (127 F. 2d 233). This Court reversed, stating that "We cannot accept either the interpretive approach or the actual decision of the court below" (317 U. S. at 541). The Court held that it was the Act's "purpose to reach any person who knowingly assisted in causing the government to pay claims which were grounded in fraud, without regard to whether that person had direct contractual relations with the government" (317 U. S. at 544–545). In so holding, the Court stated (317 U. S. at 544):

> Government money is as truly expended whether by checks drawn directly against the Treasury to the ultimate recipient or by grants in aid to states. * * *. These funds are as much in need of protection from fraudulent claims as any other federal money, and the statute does not make the extent of their safeguard dependent upon the bookkeeping devices used for their distribution. The Senatorial sponsor of this bill broadly asserted that its object was to provide protection against those

who would "cheat the United States". The fraud here could not have been any more of an effort to cheat the United States if there had been no state intermediary.

In short, under *Hess*, the source of the funds against which claims are made is critical in determining civil False Claims Act coverage. The fact that claims for federal monies are paid by an intermediary—even a non-federal intermediary—does not deprive the monies of the statute's protection.

Here, of course, we are dealing, not with a "state intermediary", but with a wholly-owned Government corporation and the sole source of the funds against which these fraudulent claims were made was the federal Treasury. It is the Government which derives the agency's profits, bears its losses, and unconditionally guarantees all of its obligations.[14] Fraudulent claims against this agency's funds are, in any realistic view, claims against the monies of the "Government of the United States"; and such claims—as this Court affirmed in *Hess*—are perforce within the reach of the Act.

There can be no question that the type of operations in which Commodity engages—and through which federal monies are committed—renders the agency vulnerable to fraudulent claims, thus making the

[14] That the "charge upon the public treasury" may be, in some instances, an "indirect one" is "immaterial" in determining unity of interest in the corporation's funds. *Emergency Fleet Corp.* v. *Western Union Telegraph Co.*, 275 U. S. 415, 424. Similarly "without legal significance" is the fact that Commodity exacts a charge for some of its services, since many nonincorporated agencies of the Government "receive fees, or some other form of compensation, for services rendered to private persons". *Ibid.*, at 424.

Act's coverage a practical necessity. The latest published report of the Secretary of Agriculture, for example, states that funds committed to Commodity's price support programs alone totaled $8,257,308,000 at the end of June, 1956, and that for 1955 the total was over seven billions. Report of the Secretary of Agriculture, 1956, p. 46. The central operational feature of these programs is the claim of entitlement to a price support loan.[15] If the Government is to be protected from speculators and other ineligible claimants who would falsely assert entitlement to price support benefits, the remedial provisions of the False Claims Act must be available to it. Illustrative of this is the fact that at the present time there are approximately 314 cases now pending in the Department of Justice or before the various District Courts, involving over 10,000 claims and totalling in excess of $3,000,000 in ascertainable damages alone. Thus, "complete indemnity for the injuries done" the Government by non-legitimate claimants under these loan programs requires applicability of the Act. *United States ex rel. Marcus* v. *Hess*, 317 U. S. 537, 549; Cf. *Helvering* v. *Mitchell*, 303 U. S. 391, 401.

4. *The Proper Significance of the Criminal Liability Provisions*

(a). In its holding that the language of the civil False Claims Act is not broad enough to cover fraudulent claims against Government corporations, the court

[15] We are advised by the Department of Agriculture that over 5 million distinct claims are annually processed by Commodity in the administration of these price-support programs.

below stated that it was "bound to give consideration" (R. 19) to the fact that the language of R. S. 3490—the civil Act—had not been amended specifically to include such claims, whereas amendments were made in the criminal Act to cover false claims against corporations "in which the United States of America is a stockholder" (40 Stat. 1015). However, in giving consideration to this fact, the court below disregarded the background of the criminal Act's amendment, and the nature of the modern wholly-owned Government corporation—both critical factors.

In 1918, the criminal Act (then contained in Section 35 of the Criminal Code) was amended to cover corporations in which the United States was a stockholder (40 Stat. 1015). The amendment was "evidently intended to protect the Emergency Fleet Corporation in which the United States was the sole stockholder" (*United States* v. *Bowman*, 260 U. S. 94, 101–102, but as to which Congress had "contemplated a corporation in which private persons might be stockholders and which was to be formed like any business corporation under the laws of the District [of Columbia]" (*Sloan Shipyards* v. *U. S. Fleet Corp.*, 258 U. S. 549, 565; see *supra*, pp. 24–25). It is not difficult to understand how doubt could arise as to whether a locally-incorporated entity which admitted of partial private ownership could be deemed the "Government of the United States" for the purposes of a statute imposing criminal penalties. This, however, is not our problem in determining the status of Commodity with reference to the civil Act. The type of hybrid-entity with which Congress was dealing in 1918 is markedly dif-

ferent from Commodity. Federal (as contrasted to local) incorporation, and the absence of any provision for private ownership, are only surface indications of the change. The truly distinguishing marks of the earlier Government corporations, such as semi-autonomous management and self-contained financing, have disappeared to such an extent in corporations like Commodity that little remains save the corporate name to differentiate the latter from other agencies of the Executive[16]. The process of amalgamation was intensified with the enactment of the Government Corporation Control Act, pursuant to which Commodity was federally chartered (*supra*, p. 29) (31 U. S. C. 841, *et seq.*). Among other things, this Act virtually eliminated "an important if not the chief reason" for the creation of the earlier incorporated agencies—an autonomy in financial transactions supposedly inconsistent with the type of accountability required of the regular agencies of Government (*Skinner & Eddy Corp.* v. *McCarl*, 275 U. S. 1, 8). The Control Act's provisions themselves afford persuasive evidence of a Congressional indisposition to treat these corporate agencies as entities apart from the Government.[17]

[16] Cf. Pritchett, *The Paradox of the Government Corporation*, 1 Public Admin. Review (1941) 381; Dimock, *Government Corporations; A Focus of Policy and Administration, I*, 43 Am. Pol. Sci. Rev. 899; Lilienthal and Marquis, *The Conduct of Business Enterprises By the Federal Government*, 54 Harv. L. Rev. 545, 556–567.

[17] The Government Corporation Control Act (59 Stat. 597, as amended, 31 U. S. C. 841, *et seq.*) provided *inter alia*, that: (1) no Government corporation was to be created or acquired thereafter, except pursuant to an act of Congress authorizing it; (2) federal incorporation of all state corporations with

Thus, whether Commodity can be classified as a part of the "Government of the United States" must be determined with reference to factors which had no application in the case of the pioneer Government corporations. Otherwise stated, it is immaterial that the criminal Act was thought to need amendment to cover the type of Government corporation existing in 1918; what is here controlling is whether Congress, in establishing Commodity some 30 years later, did so in such a manner as to bring that agency within the civil False Claims Act. The considerations which have been previously discussed (*supra*, pp. 28–37) dictate an affirmative answer. The enhanced perspective resulting from decisions of this Court in other areas where "realities" have dictated status (cf. *Cherry*

Government ownership was required to be effected prior to June 30, 1948; (3) each corporation was required to present an annual budget through the Bureau of the Budget to the President and Congress setting forth its plan of operations; (4) the budget submitted was to be the basis for appropriations and for Congressional authorization to use corporate funds or other financial resources for operating and administrative expenses; (5) estimates were required of the amount of Government capital which might be returned to the Treasury, or which might be required for restoration of capital impairment; (6) the Corporation Audits Division of the General Accounting Office was commissioned to audit corporation accounts annually; (7) the Comptroller General was required to report on the expenses of each, the origin of its funds and its financial status, with comments on irregularities; (8) all banking and checking accounts of more than $50,000 were to be kept with the Treasury; and, (9) purchases or sales of United States obligations in amounts exceeding $100,000 were prohibited unless approved by the Secretary of the Treasury and all obligations issued required the Secretary's approval as to form, denomination, maturity, interest rate terms and conditions.

Cotton Mills v. *United States*, 327 U. S. 536; *Inland Waterways Corp.* v. *Young*, 309 U. S. 517) serves to reinforce this conclusion.[18]

(b). We also believe it immaterial that Commodity's Charter Act establishes criminal penalties, but not civil liability, for submission of false statements to the corporation. The Charter Act in Section 15m (a)–(d) specifies that certain actions shall be punishable by fine, imprisonment or both, and among these is the submission of false statements (15 U. S. C. 714m (a). Significantly, however, while Section 714m (e) thereafter provides that the general *penal* statutes will be inapplicable to the extent that they relate to offenses punishable under subsections (a)–(d), the Charter Act in no way purports to preclude utilization of the long-standing, and distinct, civil remedies available to the Government. Since the civil Act has general applicability, its reach would not be limited by failure specifically to provide for its coverage in legislation creating an agency of the Government which—as we contend in this case—would otherwise

[18] These realities manifested themselves to this Court in the case of the Fleet Corporation also. See *United States* v. *Walter*, 263 U. S. 15, where the Court sustained the validity of the 1918 amendment to the criminal Act and held additionally that a conspiracy to defraud the Fleet Corporation was covered by another provision of the Criminal Code, Section 37, which punished a conspiracy "to defraud the United States in any manner" (35 Stat. 1088). The Court stated that, while this corporation could not be considered the United States, "the contemplated fraud upon the corporation if successful would have resulted directly in a pecuniary loss to the United States, and even more immediately would have impaired the efficiency of its very important instrument." 263 U. S. at 18.

be covered.[19] Cf. *United States* v. *Borden Co.*, 308 U. S. 188, 198; *General Motors Acceptance Corp.* v. *United States*, 286 U. S. 49, 61–62; *Red Rock* v. *Henry*, 106 U. S. 596, 601; *Wood* v. *United States*, 16 Pet. 342, 362–363.

Nor is the court below on sound ground when, as "an additional argument" for inapplicability of the civil Act to Government corporations, it holds that, if such corporations were covered, any civil recovery would properly be had by the corporation itself, not by the United States, whereas under the False Claims Act recovery must be made in a suit by the United States (R. 19). This overlooks the fact that the United States, as the real party in interest, may bring suit in its own name to enforce claims growing out of the transactions of its corporate agencies (see, *supra*, pp. 26–27) and, furthermore, that Congress has specifically provided that suits on Commodity's claims may be brought in the name of the United States. 15 U. S. C. 714b (c).

B. THE FEDERAL HOUSING ADMINISTRATION IS A PART OF THE "GOVERNMENT OF THE UNITED STATES" WITHIN THE MEANING OF THE CIVIL FALSE CLAIMS ACT.

What has been said with respect to the status of a wholly-owned Government corporation as a part of

[19] *Pierce* v. *United States*, 314 U. S. 306, relied on by the court below, is clearly distinguishable in this regard. There, this Court refused to apply a false impersonation statute to a person masquerading as an employee of the Tennessee Valley Authority, where (1) Congress had omitted this penal statute in specifically enumerating in the TVA Act certain other federal penal statutes applicable to TVA operations (48 Stat. 68); and (2) the statute had been amended after the indictment to make it expressly applicable to Government corporations.

the "Government of the United States" under the civil False Claims Act has *a fortiori* application to the Federal Housing Administration. Not even a corporate shell distinguishes FHA from other agencies of the Executive, and this Court has recognized its substantive identity with the Government. *United States* v. *Emory*, 314 U. S. 423; *United States* v. *Summerlin*, 310 U. S. 414.

Structurally, the Federal Housing Administration is a non-incorporated federal agency created by the President pursuant to congressional authorization (48 Stat. 1246, as amended, 12 U. S. C. 1702). The agency is charged with the administration and execution of various federal housing programs, and the monies upon which those operations are based have their origin in Congressional appropriations.[20] The powers of the agency are vested in the Federal Housing Commissioner, an official appointed by the President with the advice and consent of the Senate (12 U. S. C. 1702). FHA, itself, is a constituent agency of the Housing and Home Finance Agency, and the

[20] The separate insurance funds which are the bases for FHA operation of the various housing programs stem either from Congressional appropriations (direct or through the Reconstruction Finance Corporation) or from Congressional authorization to transfer monies from an established fund to one that is newly created (see, *e. g.*, 12 U. S. C. 1702, 1705, 1708, 1737, 1747i, 1748a). Until the income from these funds was sufficient to cover operating expenses, allocations for this purpose were made from the United States Treasury through the RFC in accordance with the provisions of the National Housing Act and subsequent appropriations acts. Since July 1, 1937, a portion of the allocations, and since July 1, 1940, all allocations for expenses have been made from the various FHA insurance funds (see Tenth Annual Report (1956), Housing

Commissioner acts under the general supervision of the Administrator of that agency.[21]

FHA, in short, is as much a part of the "Government of the United States" as any other non-incorporated executive agency. This is not altered by the fact that the Commissioner in carrying out his statutory duties is "authorized, in his official capacity, to sue and be sued in any court of competent jurisdiction, State or Federal" (12 U. S. C. 1702). Corporate status was not conferred thereby; rather, this proviso, which was added by an amendment to the Housing Act in 1935 (49 Stat. 722), was an exercise of Congress' "full power to endow the Federal Housing Administration with the government's immunity from suit or to determine the extent to which it may be subjected to the judicial process". *Federal Housing Administration* v. *Burr*, 309 U. S. 242, 244. See also *Federal Land Bank* v. *Priddy*, 295 U. S. 229; *Keifer &*

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and Home Finance Agency, p. 173). Despite the broad statutory power conferred upon the Commissioner to make expenditures, the actual amounts are carefully controlled by Congress through authorizations contained in its appropriations acts (see, *e. g.*, Independent Offices Appropriation Act, 1957 (70 Stat. 339, 354); Independent Offices Appropriation Act, 1956 (69 Stat. 199, 215); Independent Offices Appropriation Act, 1955 (68 Stat. 272, 297); First Independent Offices Appropriation Act, 1954 (67 Stat. 298, 315)).

[21] The Federal Housing Administration, together with other federal agencies having comparable functions, became a constituent agency within the Housing and Home Finance Agency pursuant to Section 1, Reorganization Plan No. 3, 1947 (61 Stat. 954, 5 U. S. C. note 133y–16). The Administration's powers, which were originally exercised by a Federal Housing Administrator (48 Stat. 1246), were, at the same time, transferred to the Federal Housing Commissioner—the newly created FHA head (Reorganization Plan No. 3, *supra*, Section 3).

Keifer v. Reconstruction Finance Corporation, 306 U. S. 381.

The effect of this "sue and be sued" provision on FHA's status was dealt with by the Court of Appeals for the District of Columbia Circuit in *Korman v. Federal Housing Administrator*, 113 F. 2d 743. There, the court, after noting initially that FHA was "constituted by Congress" with "no suspicion of a corporate identity", went on to hold that the provision subsequently added for suit by and against the Administrator did not confer upon FHA the status of a separate legal entity. The sole effect of the amendment, the court stated, was to preclude the assertion of sovereign immunity in suits against the agency, and, as "a matter of convenience", to permit the Administrator to appear in his official capacity to press the agency's claims (113 F. 2d at 746). Cf. *In re Wilson*, 23 F. Supp. 236, 240 (N. D. Tex.).[22]

Nor is it indicative of corporate status that FHA has been made subject to the auditing and budgetary provisions of the Government Corporation Control Act (59 Stat. 597, as amended, 31 U. S. C. 841, *et seq.*) A Congressional desire to provide "current financial control" (31 U. S. C. 841), not corporate structure, underlies that Act's inclusion of FHA (cf. 12 U. S. C. 1749a). This is borne out by the fact that, when the control Act was first passed in 1945 (59 Stat. 597), the FHA, which had been in existence for over ten years, was not included as a Government corporation.

[22] Also noteworthy is the fact that, in the Act creating FHA, Congress created the Federal Savings and Loan Insurance Corporation and specifically gave to it corporate attributes not conferred upon FHA (48 Stat. 1246, 1256).

It was not until 1948 that FHA was brought within the Act's coverage (62 Stat. 1283). In any event, as is the case with Commodity, *supra*, pp. 37–38, the control Act evidences Congressional awareness of the Government's financial stake in such agencies and an intimate concern with their operations and the disposition of federal monies. Insofar as the applicability of the civil False Claims Act is concerned, these factors strengthen, rather than diminish, the arguments in favor of identity with the "Government of the United States."[23]

II

A Fraudulent Claim for an FHA-Insured Loan Constitutes a "Claim" Against the United States Under the Civil False Claims Act, Prior to Default on the Loan and Indemnification of the Lender by the Government

As an additional ground for denying the Government relief in *McNinch*, the court below affirmed its agreement with decisions of the Courts of Appeals for Third and Fifth Circuits which had determined—over strong dissents in each case—that a fraudulent claim for an FHA-insured loan was not a "claim" against the United States within the meaning of the False Claims Act. See, *United States* v. *Tieger*, 234 F. 2d 589 (C. A. 3), certiorari denied, 352 U. S. 941; *United States* v. *Cochran*, 235 F. 2d 131 (C. A. 5), certiorari denied, 352 U. S. 941. The substance of those decisions was that the Act "deals only with

[23] As is the case with Commodity, false claims caused to be presented to FHA are subject to special criminal sanctions (see 18 U. S. C. 1010). The arguments advanced *supra*, pp. 39–40, as to unimpaired coverage by the generally applicable civil Act, apply here with equal force.

false claims upon the government for money or property" (see *Tieger, supra,* 234 F. 2d at 592) and that a claim to Government credit insurance cannot be so classified—at least in the absence of a loan default and consequent indemnification of the lender by the Government (*ibid.,* at 591).

We do not believe that the thrust of the Act, which speaks of "any claim," may be so limited. Undeniably, the FHA-loan claims constitute efforts—successful in *McNinch*—to "cheat the United States" by obtaining extensions of the Government's credit on spurious grounds. Literally read, as even *Tieger* would concede (234 F. 2d at 590), the Act's terms embrace the course of conduct by means of which the United States was so "cheated." In any event, the coverage which the Act seemingly calls for—and which is clearly needed—is not precluded by restricting the term "claim" to the "conventional meaning of demand for money or property" (234 F. 2d at 591). We show below that, even under this view, the statute reaches the fraudulent claim to Government credit insurance itself, and that default on the underlying loan does not—and, if practical relief is to be afforded, cannot—condition invocation of the Act's remedial provisions.

A. A CLAIM OF RIGHT TO GOVERNMENT CREDIT INSURANCE IS A "CLAIM" AGAINST THE GOVERNMENT WITHIN THE MEANING OF THE CIVIL FALSE CLAIMS ACT

1. *The Mechanics of the FHA Title I Loan Insurance Program*

Preliminary to any consideration of the reach of the False Claims Act in connection with *McNinch,* the

eleven fraudulent claims to Government credit insurance which were made by the South Carolina National Bank at respondents' instigation must be placed in proper context. For this purpose, a brief summary of Title I insurance procedures is appropriate.

Under Title I of the National Housing Act (48 Stat. 1246, as amended, 12 U. S. C. 1701, *et seq.*), the Federal Housing Commissioner is empowered, upon such terms and conditions as he may prescribe, to insure qualified lending institutions against losses sustained as a result of loans made by them for the purpose of financing alterations, repairs and improvements upon or in connection with real property. 12 U. S. C. 1703 (a). Pursuant to regulations authorized by the Act (12 U. S. C. 1703 (g)), a lending institution is first approved by FHA to grant loans eligible for insurance under Title I, and is given a contract of insurance under which the FHA agrees, generally, to indemnify the insured against losses sustained by it up to an aggregate amount equal to 10% of the total sums advanced by the institution in eligible loans and reported to FHA for insurance (12 U. S. C. 1703 (a); 24 CFR 200.2–200.3). A borrower desiring to obtain a Title I loan makes application to the lending institution, either directly or through contractors such as respondents, on an FHA form (FHA Title I Credit Application Property Improvement Loan) which provides for submission of facts as to the nature of the work to be done, the ownership of the property, and the borrower's credit status (24 CFR 200.3 (a)). The "entire transaction is the responsibility of the lending institution holding a contract of

insurance" and the "determination as to the eligibility of such loan for insurance, the approval of the borrower's credit and all other details of the transaction are handled by the lending institution, without prior examination or approval of the transaction by the Federal Housing Administration" (24 CFR 200.3 (a)). In determining whether the prospective borrower is a reasonable credit risk, the lending institution is permitted to rely on statements of fact made by the former (24 CFR 201.6 (b)). Within 31 days after the loan is made, the lending institution must report the details of the loan transaction to the FHA on an agency form provided for that purpose (24 CFR 200.3 (c)). After the details of the transaction have been reported to it, FHA computes the insurance premium which will be due and payable by the lending institution, records the transaction, and acknowledges the loan for insurance (24 CFR 200.3 (c)).[24]

Thus, it will be seen, upon FHA approval of a lending institution, the Government, as a practical matter, subjects its credit, and therefore its assets, to claims for loan insurance on transactions which the lender deems eligible under the Act. When FHA acknowledges coverage of a particular loan transaction, as it did in *McNinch*, it immediately undertakes a specific risk, becoming liable as an insurer for losses suffered

[24] If, after the loan is made, a lending institution which has acted in good faith discovers, *inter alia*, any material misstatements by the borrower, dealer, or others, the eligibility of the loan for insurance will not be affected. The discovery, however, must be promptly reported to the Commissioner (24 CFR 201.6 (b)).

by the lending institution on that loan.[25] This Governmental liability is a direct result of the credit request made by the loan applicant—a request which, as a practical matter, is directed against the assets of the United States, not the lender.

2. *The Scope of the False Claims Act.*

(a). In determining the reach of the civil provisions in relation to the fraudulent claims in question, the Act is to be accorded "the fair meaning of its intendment," and its purpose, which, was "to provide protection against those who would cheat the United States' ", is to be accorded due weight. *United States ex rel. Marcus* v. *Hess*, 317 U. S. 537, 542, 544. The "penal" construction philosophy which finds expression in *Cochran, supra* (235 F. 2d at 133) is inappropriate—particularly so, since this Court has unmistakably rejected the "utmost strictness" ap-

[25] Although FHA insurance covers only 10% of the total amount of an approved lender's loans, the actual protection afforded would, in the absence of highly unusual circumstances, cover all transactions. This is evidenced by the fact that the ratio of claims paid to net proceeds of loans outstanding has averaged 2.06% in the period from 1934–1956. Tenth Annual Report (1956), Housing and Home Finance Agency, p. 90. See also Senate Report No. 1472, 83rd Congress, 2d Sess. Since the enactment of the Housing Act of 1954 (68 Stat. 590), only 90% of the loss suffered on an individual loan transaction may be indemnified by FHA (12 U. S. C., Supp. IV, 1703 (a)). This provision was added so as to instill "a measure of self-interest on the part of the lender in each loan in an amount sufficient to induce more careful lending operations." House Report No. 2271, 83rd Cong., 2d Sess., p. 64.

proach to the civil Act's terms (*Marcus* v. *Hess*, *supra*, at 540–541).

In its literal terms, the False Claims Act is directed against (*supra*, p. 3):

> Any person * * * who shall * * * cause to be presented, for * * * approval to or by any * * * [Federal] officer * * * any claim * * * against the Government * * * knowing such claim to be false * * * or who, for the purpose of obtaining * * * approval of such claim * * * uses * * * any false * * * certificate * * * knowing the same to contain any fraudulent or fictitious statement * * *.

As we read this unembellished language of the Act, the fraudulent claims in *McNinch* are squarely within its terms. The respondents "caus[ed] to be presented for * * * approval" a "claim" for credit "against the Government of the United States * * * knowing such claim to be false" (cf. R. 14).[26] See the dissenting opinion of Chief Judge Biggs in *United States* v. *Tieger*, 234 F. 2d 589, 594–595 (C. A. 3), certiorari denied, 352 U. S. 941.

Opposed to this reading of the Act are the majority opinions in *Tieger*, *supra*, and *United States* v. *Cochran*, 235 F. 2d 131 (C. A. 5), certiorari denied, 352

[26] The Act also applies to a person who knowingly makes a "claim" or "certificate" containing a "fraudulent or fictitious statement" for the purpose of "obtaining or aiding to obtain the payment or allowance of any false or fraudulent claim" (*supra*, p. 3). Thus, respondents' false credit applications and credit reports (*supra*, pp. 9–11), as well as the claims made by the lender as a result of the applications, would be covered by the Act's express terms.

U. S. 941. In *Tieger*, the Third Circuit (234 F. 2d at 590–591) held that a proper construction of what would appear to be the Act's plain terms necessitates the insertion of an implied qualification restricting a "claim against the United States" to the "conventional meaning of demand for money or property". The court further held that, while access to the Government's credit constitutes a "commercially advantageous privilege", a fraudulent claim of right to that credit is "not a claim in normal business or legal usage" (234 F. 2d at 591). Subsequently, in *United States* v. *Cochran, supra*, also involving Title I insurance claims, the Fifth Circuit, with Judge Rives dissenting, reached a like result, improperly characterizing (235 F. 2d at 134) the Act as penal (see *United States ex rel. Marcus* v. *Hess*, 317 U. S. 537, and *United States ex rel. Ostrager* v. *New Orleans*, 317 U. S. 562).

In *Tieger*, reliance was placed on language used in *United States* v. *Cohn*, 270 U. S. 339, a criminal False Claims Act prosecution. There, the Court stated in *dicta* that the provisions of the criminal Act (270 U. S. at 345–346)

> * * * relating to the payment or approval of a "claim upon or against" the Government relates solely to the payment or approval of a claim for money or property *to which a right is asserted against the Government, based upon the Government's own liability to the claimant.* [Emphasis added.]

Since *Cohn*—which was distinguished on its facts in *Hess* (317 U. S. at 545)—involved a claim against property in which the Government had no interest,

its *dictum* is clearly inapposite here where a fraudulent claim was caused to be presented "against the Government based upon the Government's own liability to the claimant,"—seeking an extension, as of right, of a "commercially advantageous" benefit with a concomitant hazarding of the Government's credit.[28]

(b) However, even if it be assumed *arguendo* that, for purposes of the False Claims Act, the term "claim" is to be limited to a demand for "money or property", we believe that, according appropriate weight to commercial realities, the statutory language embraces a claim of right to Government credit insurance.

Unless the term "property" is to be restricted to tangible commodities alone, it would seem that that status cannot be denied the object of the *McNinch*

[27] In *Cohn*, the Court held the criminal provisions inapplicable to misstatements by means of which defendants obtained possession of nondutiable merchandise from customs officials. The Court pointed out that the false application sought "entry and delivery of nondutiable merchandise, as to which no claim is asserted against the Government, to which the Government makes no claim, and which is merely in the temporary possession of an agent of the Government for delivery to the person who may be entitled to its possession" (270 U. S. at 346). As Chief Judge Biggs stated in *Tieger*: "the ruling in the *Cohn* case [is not] controlling here for the question presented here was not in focus therein" (234 F. 2d at 595, n. 5).

[28] One court has stated that the "money or property" qualification is not an absolute one and that a claim for Government services (second-class mailing privileges) constituted a "claim" within the meaning of the False Claims Act, irrespective of whether those services are translatable into monetary equivalents. *United States ex rel. Rodriquez* v. *Weekly Publications, Inc., et al.*, 68 F. Supp. 767, 770 (S. D. N. Y.).

claims—the credit of the United States. Credit has central importance in our highly developed economy, which is substantially a credit economy. In private business spheres, credit status has long been treated as a property interest and is accorded by the law the protection due a valuable intangible property right.[29] Determination of the treatment to be accorded the Government's credit can be no less subject to considerations grounded in reality. On the basis of its credit, the Government is enabled to borrow vast amounts of money and at low interest rates. That same credit permits the Government to execute programs such as the one here in controversy, and to do so with an outlay of funds disproportionately small in comparison to the obligations undertaken. Even more than in the case of private businesses, the Government's credit is a commodity which is the subject of deliberate usage and careful control. The Housing Act itself represents an instance of a calculated Government utilization of this intangible "property" (cf. *United States* v. *Emory*, 314 U. S. 423, 433), and the manner in which the Government's credit is administered by FHA affects, not only the housing industry, but the entire economy as well. The Government, in

[29] See, *e. g.*, *Maytag Co.* v. *Meadows Mfg. Co.*, 45 F. 2d 299, 302 (C. A. 7), certiorari denied, 283 U. S. 843; *Aetna Life Ins. Co.* v. *Mutual Benefit Health & Accident Assn.*, 82 F. 2d 115, 118 (C. A. 8); *Meyerson* v. *Hurlbut*, 98 F. 2d 232, 234 (C. A. D. C.), certiorari denied, 305 U. S. 610; *Reporters' Assn.* v. *Sun Printing & Pub. Assn.*, 186 N. Y. 437, 79 N. E. 710; *Judevine* v. *Benzies-Montanye Fuel & Warehouse Co.*, 222 Wisc. 512, 520, 269 N. W. 295; *Hayes* v. *Press Co.*, 127 Pa. 642, 18 Atl. 331; *Froslee* v. *Lund's State Bank*, 131 Minn. 435, 155 N. W. 619.

short, has as substantial an interest in controlling the disposition of its credit as in controlling the use of its tangible assets.

The form in which the Government's credit was here sought—credit risk insurance—is itself a well-established commercial commodity. Millions of dollars are expended in premiums each year by lenders in business and industry to purchase the type of right to indemnity which the lending institution in this case obtained as a result of respondents' misrepresentations. In the area of credit life insurance alone, nearly 15 billion dollars of credit insurance, covering approximately one-half of the outstanding consumer credit, was in force at the end of 1955.[30] Protection afforded by this type of insurance is obviously of value to the insured even if there is no indemnifiable loss on any of the debts covered by the policy. The very existence of such insurance serves to free an insured's capital for other purposes by reducing the size of its loss reserves and improving its investment position by reducing the possibility of unexpected and damaging defaults in accounts receivable.[31] Accordingly, credit insurance, like insurance of other types (cf. *Burnet* v. *Wells*, 289 U. S. 670, 679), has been accorded recognition as a valuable and enforceable property right.[32]

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[30] *1956 Life Insurance Fact Book*, pp. 28–29.

[31] Cf. Paton, *Accountants' Handbook* (2d Ed.), pp. 248–256, 1500; Finney and Miller, *Advanced Principles of Accounting* (4th Ed.), pp. 118–141; Kester, *Principles of Accounting* (3rd Rev. Ed.), pp. 521–529.

[32] See, *e. g.*, *National Surety Co.* v. *Mutual Veneer Co.*, 66 F. 2d 88 (C. A. 6); *American Credit-Indemnity Co.* v. *E. R. Apt Shoe Co.*, 74 F. 2d 345 (C. A. 1); *American Credit Indemnity*

The Title I insurance here obtained has a special value to its recipients. The Government's reason for undertaking this loan guarantee program was to stimulate a flow of private loan capital which otherwise would not have been forthcoming. Cf. *United States* v. *Emory*, 314 U. S. 423, 433. By making its credit available as of right to approved lending institutions, borrowers such as respondents' customers are able to obtain for property improvement low interest, unsecured loans which would otherwise be unavailable. Similarly, dealers in respondents' position are enabled, as a practical matter, to obtain additional customers and to shift the risk of non-payment for their services to the Government. All this, it is to be noted, is at the expense of the credit extended by the United States. If the "property" concept is to have a relation to commercial reality, the credit insurance which the lending institution may claim as of right under Title I should be accorded that status.

The vulnerability of the Government's credit to those who would "cheat the United States" reinforces its property status for False Claims Act purposes. The FHA Title I insurance program is only one of a number of Government loan guaranty programs all of which have special eligibility requirements and, typically, offer advantages over commercial credit terms available to the public. These guaranty pro-

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Co. v. *Athens Woolen Mills*, 92 Fed. 581 (C. A. 6); *Tebbets* v. *Mercantile Credit Guarantee Co.*, 73 Fed. 95 (C. A. 2); *Hare & Chase* v. *National Surety Co.*, 49 F. 2d 447 (S. D. N. Y.), affirmed, 60 F. 2d 909 (C. A. 2), certiorari denied, 287 U. S. 662; *People* v. *Rose*, 174 Ill. 310, 51 N. E. 246; *People* v. *Mercantile Credit Guarantee Co.*, 166 N. Y. 416, 60 N. E. 24.

grams make up a substantial part of the Government's financial dealings with its citizens and provide an area of maximum opportunity for those who would "cheat the United States" by misrepresenting their eligibility for loan guaranties.[33] FHA Title I loans form only a small part of this overall guaranty picture, yet under that program alone the recent annual average of property improvement loans granted has been over one million and the average total amounts, approximately $700,000,000 annually (Tenth Annual Report (1956), Housing and Home Finance Agency, pp. 40, 59),[34] The vulnerability of the Government's credit under such programs has been deliberately limited by statute and regulation to enumerated types of loans and to borrowers meeting specified qualifications. When, as a result of fraud, the United States is induced to pledge its credit for the benefit of a person falsely claiming eligibility, the Government is "cheated" in that its property—which

[33] A by no means exhaustive list includes the loan guaranties made by the Export-Import Bank (12 U. S. C. 635); insurance of housing loans by the Housing and Home Finance Administration (12 U. S. C. 1701g); mortgage insurance by the Federal Housing Administration (12 U. S. C. 1706c; 1707–1709, 1744); loan guaranties to small business by the Small Business Administration (15 U. S. C., Supp. IV, 636); loan guaranties to veterans by the Veterans Administration (38 U. S. C. 694, *et seq.*); and defense loan guaranties by the Treasury Department (50 U. S. C. App. 2091, *et seq.*).

[34] At the end of 1956, the net amount of outstanding FHA loan insurance, under all programs administered by that agency, was in excess of $20 billion. Of this amount, over $15 billion represented home mortgage insurance, $4 billion property mortgage insurance, and $1 billion property improvement loan insurance (Tenth Annual Report (1956), Housing and Home Finance Agency, p. 39).

includes the use of its credit—has been obtained by fraudulent means.

B. DEFAULT ON A LOAN WHICH THE GOVERNMENT HAS BEEN FRAUDULENTLY INDUCED TO INSURE IS NOT A CONDITION PRECEDENT TO APPLICABILITY OF THE FALSE CLAIMS ACT

Implicit in the *Tieger* rule, *supra*, is the assumption that recourse to the remedial provisions of the False Claims Act must await a default on the particular loan which the Government has been fraudulently induced to insure (234 F. 2d at 590–591). Yet, once it is established that a claim of right to Government credit insurance is a "claim upon or against the the Government of the United States"—or, more narrowly, against the Government's "property"—it becomes immaterial whether a loan on which insurance was fraudulently procured is subsequently defaulted. Analytically, the statutory language, even as qualified, makes such a credit claim a "claim" in and of itself. Moreover, in considering this claim of right and its consequences, it must be remembered that the Government's credit is irrevocably committed once FHA insurance is obtained. (See p. 10, *supra*, fn. 6.) Thus, when a default occurs, payment by the United States is required. This payment is not the consequence of an independent obligation which arises at the time of default; rather, it is the fulfillment of a previously undertaken commitment to indemnify the lender against loss in the particular loan transaction insured.

Default, in short, cannot be considered a determinative factor in activating the civil Act's provisions. The sole effect of a subsequent default is a practical

one, *i. e.*, it gives rise to an out-of-pocket loss and specific ascertainable damages. But, insofar as statutory coverage is concerned, no significance attaches to this fact. While a defrauding claimant must cause injury to the Government, an ascertainable pecuniary loss is not a prerequisite to liability under the civil False Claims Act. The statute provides a civil remedy against a person who makes a false "claim upon or against the Government," and liquidated damages may be recovered even though no monetary loss is suffered. This facet of the Act has been twice affirmed by the Court. See *Rex Trailer Co., Inc.* v. *United States*, 350 U. S. 148, 153; *United States ex rel. Marcus* v. *Hess*, 317 U. S. 537; see also, *United States* v. *Rohleder*, 157 F. 2d 126, 129 (C. A. 3); *United States* v. *Rainwater*, 244 F. 2d 27, 28 (C. A. 8). Thus, in *McNinch*, the absence of a loan default, and a consequent monetary outlay, would not, in and of itself, preclude recourse to the Act.

The absence of a direct pecuniary loss on these loan transactions does not, however, negate injury to the Government. The Government's property interest in the proper use of its credit was abused in the extension of that credit to individuals who were not "reasonable credit risk[s]" (*infra*, p. 65; see also, *supra*, pp. 46–47). Moreover, the administration of its Title I home improvement program was impaired. As shown, *supra*, p. 46, the provisions of the National Housing Act authorize the FHA to insure repayment of only 10 percent of the total value of otherwise eligible loans. Accordingly, respondents' fraudulently procured Title I loans resulted in a

decrease in the amount of protection that would otherwise have been available to lenders proffering eligible loans. Clearly—minor though these amounts may here be—this was a frustration of the program's purposes. It was precisely this type of injury to the Government's interests that was dealt with by this Court in *Rex Trailer Co., Inc.* v. *United States*, 350 U. S. 148, 153–154; see also, *United States* v. *Weaver*, 207 F. 2d 796, 798 (C. A. 5). Thus, apart from any expense in investigating and prosecuting these frauds (cf. *Helvering* v. *Mitchell*, 303 U. S. 391, 401), and the reasonable inference of unjust enrichment to respondents (cf. *Rex Trailer Co., Inc.* v. *United States*, *supra*, at 153, n. 6), the Government's interests were substantially prejudiced. The resulting damages, of course, are not readily ascertainable. But it is the very purpose of the civil Act's liquidated damages provision to afford an appropriate recovery in such cases. In *Rex Trailer Co., Inc.*, *supra*, fraudulent purchases of Government surplus vehicles precluded, *inter alia*, sales to purchasers of the class intended by statute and promoted "undesirable speculation," resulting in "obvious * * * injury to the Government" (350 U. S. at 153). Dealing there with the problem of the Government's recovery under a statute "essentially the equivalent" of the False Claims Act, the Court stated that although the "damages resulting from this injury may be difficult or impossible to ascertain * * *, it is the function of liquidated damages to provide a measure of recovery in such circumstances" (350 U. S. at 153–154).

Moreover, any practical advantage to be derived from awaiting the occurrence of a default is far outweighed by the difficulties which such a delay would entail. If the Government, possessing evidence that it had been defrauded or misled into extending its credit, were required to sit idly by until such time as a default occurred, the efficacy of its damage remedy against the wrongdoer might be severely impaired if not destroyed. Loans insured pursuant to the provisions of the National Housing Act may have maturity dates in excess of thirty years.[3] In many cases, the Government's chances of recovering liquidated damages from the defrauder for the injuries it has incurred—injuries in no way dependent on default and an out-of-pocket loss (*supra*)—will be greatly reduced, if not eliminated, as a consequence of asset depletion in the interim between claim and default. This is peculiarly the case where it is the borrower who is the defrauding party. There, default itself is indicative of financial irresponsibility and of the futility of the Act's civil remedy. In such a case, if default is to condition civil relief, the Government would be required to forego its remedy until the happening of an event which itself marks the ineffectiveness of that remedy.

Another practical difficulty of delay in the Act's applicability until default is the evidentiary problem. The point in time at which the fraudulent claim is made may be separated from the time of default by many years (*supra*). Evidence relating to the

[3] See, *e. g.*, CFR 201.2 (d); 202.6 (a) (9); 203.8; 221.18; 243.10.

fraud that was once available may no longer be accessible—particularly, where, as here, the fraud concerns the credit standing of the borrower at the time of his loan application. These evidentiary problems, moreover, are not one-sided. They may prejudice either the Government or—where they bear on exculpatory matters—the party against whom recovery is sought.

Such practical considerations reinforce our prior arguments as to the irrelevance of default in determining the availability of the remedial provisions of the False Claims Act. The Act is violated by the fraudulent claim against the Government's credit; the injuries occasioned thereby are to be redressed through the liquidated damages provision of the Act, irrespective of default.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the decision of the court below be reversed with directions to reinstate the judgments of the District Courts in the *Cato* and *Toepleman* cases and to order a determination on the merits by the trial court in *McNinch*.

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APPENDIX

1. Title I of the National Housing Act (48 Stat. 1246, as amended, 12 U. S. C. 1703) provides in part:

INSURANCE OF FINANCIAL INSTITUTIONS

(a) [12 U. S. C., Supp. IV, 1703 (a)] The Commissioner is authorized and empowered upon such terms and conditions as he may prescribe, to insure banks, trust companies, personal finance companies, mortgage companies, building and loan associations, installment lending companies and other such financial institutions, which the Commissioner finds to be qualified by experience or facilities and approves as eligible for credit insurance, against losses which they may sustain as a result of loans and advances of credit, and purchases of obligations representing loans and advances of credit, made by them on and after July 1, 1939, and prior to September 30, 1956, for the purpose of financing alterations, repairs, and improvements upon or in connection with existing structures, and the building of new structures, upon urban, suburban, or rural real property (including the restoration, rehabilitation, rebuilding, and replacement of such improvements which have been damaged or destroyed by earthquake, conflagration, tornado, hurricane, cyclone, flood, or other catastrophe), by the owners thereof or by lessees of such real property under a lease expiring not less than six months after the maturity of the loan or advance of credit. In no case shall the insurance granted by the Commissioner under this section to any such financial institution on loans, advances of credit, and purchases made by such financial institution for such purposes on and after July 1, 1939, exceed 10 per centum of the total amount of such loans, advances of credit,

and purchases: *Provided*, That with respect to any loan, advance of credit, or purchase made after the effective date of the Housing Act of 1954, the amount of any claim for loss on any such individual loan, advance of credit, or purchase paid by the Commissioner under the provisions of this section to a lending institution shall not exceed 90 per centum of such loss. The aggregate amount of all loans, advances of credit, and obligations purchased, exclusive of financing charges, with respect to which insurance may be heretofore or hereafter granted under this section and outstanding at any one time shall not exceed $1,750,000,000.

After the effective date of the Housing Act of 1954, (i) the Commissioner shall not enter into contracts for insurance pursuant to this section except with lending institutions which are subject to the inspection and supervision of a governmental agency required by law to make periodic examinations of their books and accounts, and which the Commissioner finds to be qualified by experience or facilities to make and service such loans, advances or purchases, and with such other lending institutions which the Commissioner approves as eligible for insurance pursuant to this section on the basis of their credit and their experience or facilities to make and service such loans, advances or purchases; (ii) only such items as substantially protect or improve the basic livability or utility of properties shall be eligible for financing under this section, and therefore the Commissioner shall from time to time declare ineligible for financing under this section any item, product, alteration, repair, improvement, or class thereof which he determines would not substantially protect or improve the basic livability or utility of such properties, and he may also declare ineligible for financing under this section any item which he determines is especially subject to selling abuses; and (iii) the Commissioner is authorized and directed, by such regulations or

procedures as he shall deem advisable, to prevent the use of any financial assistance under this section (1) with respect to new residential structures that have not been completed and occupied for at least six months, or (2) which would, through multiple loans, result in an outstanding aggregate loan balance with respect to the same structure exceeding the dollar amount limitation prescribed in this subsection for the type of loan involved. * * *

(b) No insurance shall be granted under this section to any such financial institution with respect to any obligation representing any such loan, advance of credit, or purchase by it (1) if the amount of such loan, advance of credit, or purchase made for the purpose of financing the alteration, repair, or improvement of existing structures exceeds $2,500, or for the purpose of financing the construction of new structures exceeds $3,000; (2) if such obligation has a maturity in excess of three years and thirty-two days, except that such maturity limitation shall not apply if such loan, advance of credit, or purchase is for the purpose of financing the construction of a new structure for use in whole or in part for agricultural purposes; or (3) unless the obligation bears such interest, has such maturity, and contains such other terms, conditions, and restrictions as the Commissioner shall prescribe, in order to make credit available for the purposes of this subchapter: * * *

* * * * *

(f) [12 U. S. C., Supp. IV, 1703 (f)] The Commissioner shall fix a premium charge for the insurance hereafter granted under this section, but in the case of any obligation representing any loan, advance of credit, or purchase, such premium charge shall not exceed an amount equivalent to 1 per centum per annum of the net proceeds of such loan, advance of credit, or purchase, for the term of such obligation, and such premium charge shall

be payable in advance by the financial institution and shall be paid at such time and in such manner as may be prescribed by the Commissioner. The moneys derived from such premium charges and all moneys collected by the Commissioner as fees of any kind in connection with the granting of insurance as provided in this section, and all moneys derived from the sale, collection, disposition, or compromise of any evidence of debt, contract, claim, property, or security assigned to or held by the Commissioner as provided in subsection (c) of this section with respect to insurance granted on and after July 1, 1939, shall be deposited in an account in the Treasury of the United States, which account shall be available for defraying the operating expenses of the Federal Housing Administration under this section, and any amounts in such account which are not needed for such purpose may be used for the payment of claims in connection with the insurance granted under this section. * * *

(g) The Commissioner is authorized and directed to make such rules and regulations as may be necessary to carry out the provisions of this subchapter.

2. Federal Housing Commission regulations, in effect at the time the loans involved in this proceeding were made, provided in part (Note: for convenience, reference is to the latest edition of 24 CFR, there having been no applicable changes in the regulations):

SUBCHAPTER B—PROPERTY IMPROVEMENT LOANS

PART 201—CLASS 1 AND CLASS 2 PROPERTY IMPROVEMENT LOANS [REVISED]

* * * * * *

§ 201.1 *Definitions.* As used in the regulations in this part, the term:

* * * * * *

(e) "Insured" means a financial institution holding a contract of insurance under Title I of the act.

(f) "Loan" means an advance of funds or credit or the purchase of an obligation evidenced by a note.

* * * * *

(i) "Borrower" means one who applies for and receives a loan in reliance upon the provisions of the act and whose interest in the property to be improved is (1) a fee title, or (2) a life estate, or (3) an equitable interest under an instrument of trust or contract, or (4) a lease having a fixed term, expiring not less than six calendar months after the maturity of the loan.

* * * * *

§ 201.5 [Cumulative Pocket Supplement, 1957] *Credits and collections.*—(a) *Credit application:* Prior to making a loan the insured shall obtain a dated Credit Application executed by the borrower on a form approved by the Commissioner. A separate Credit Application is required for each loan made or note purchased.

(b) *Credit investigation.* The Credit application, supplemented by such other information as the insured deems necessary, must, in the judgment of the insured, clearly show the borrower to be solvent, with reasonable ability to pay the obligation and in other respects a reasonable credit risk. If, after the loan is made, an insured who acted in good faith discovers any material misstatements or misuse of the proceeds of the loan by the borrower, dealer, or others, the eligibility of the note for insurance will not be affected. However, the insured shall promptly report such discovery to the Commissioner.

* * * * *

(f) *Security.* The taking of security to secure the payment of a loan is left to the dis-

cretion of the insured unless specifically required by the Commissioner in accordance with the provisions of paragraph (e) of this section or of § 201.2 (d) (2) (iii). An insured may permit the substitution or subordination of security provided it can be shown when claim is made that at the time of such action the original security value was not impaired or reduced as a result of such action. Upon presentation of the facts the prior approval of the Commissioner may be obtained by the insured to any proposed substitution or subordination of security.

(g) *Collections.* The insured is required to service loans in accordance with acceptable practices of prudent lending institutions. In the event of default, the insured should have adequate facilities for contacting the borrower and otherwise exercise diligence in collecting the amount due. The insured is responsible to the Commissioner for proper collection efforts even though actual collection may be performed by an agent.

* * * * *

§ 201.6 [Cumulative Pocket Supplement, 1957] * * * (b) *Use of proceeds.* The proceeds of a loan shall be used only to finance alterations, repairs, and improvements upon real property or in connection with existing structures which substantially protect or improve the basic livability or utility of the property, and which are commenced in reliance upon the credit facilities afforded by Title I of the act.

(c) *Reliance on Credit Application.* An insured acting in good faith may, in the absence of information to the contrary, rely upon all statements of fact made by the borrower, which are called for by the borrower's Credit Application, in determining the eligibility of the loan.

* * * * *

§ 201.10 *Report of loans.* Loans shall be reported on the prescribed form to the Federal Housing Administration at Washington, D. C.,

within 31 days from the date of the note or date upon which it was purchased. Any loan refinanced as provided in § 201.9 shall likewise be reported on the prescribed form within 31 days from date of refinancing. In any case, the Commissioner may, in his discretion, accept a late report.

§ 201.11 [Cumulative Pocket Supplement, 1957] *Claims*—(a) *Claim application.* Claim for reimbursement for loss on an eligible loan shall be made on a form provided by the Commissioner and executed by a duly qualified officer of the insured. The claim shall be accompanied by the insured's complete credit and collection file pertaining to the transaction.

(b) *Claim after default.* Claim may be made after default provided demand has been made upon the debtor for the full unpaid balance of the note.

§ 201.13 [Cumulative Pocket Supplement, 1957] *Insurance charge*—(a) *Rate.* The insured shall pay to the Commissioner an insurance charge equal to sixty-five one-hundredths (0.65) of 1 percent per annum of the net proceeds of any eligible loan reported and acknowledged for insurance * * *

(b) *When payable.* Such insurance charge for the entire term of the loan shall be paid within 25 days after the date the Commissioner acknowledges receipt to the insured institution of the report of loan * * *

* * * * *

(d) *Refund or abatement.* There shall be no refund or abatement of any portion or installment of the insurance charge except:

(1) The charge on a refinanced note may be credited with the unearned portion of the charge on the original note;

(2) Insurance charges falling due after claim is filed or the note is prepaid in full;

(3) The charge paid on a loan or portion thereof found to be ineligible * * *.

* * * * *

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